

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HP TUNERS, LLC,

Plaintiff,

v.

KEVIN SYKES-BONNETT, et al.,

Defendants.

CASE NO. C17-5760 BHS

ORDER DENYING
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT

This matter comes before the Court on Defendants Syked ECU Tuning Incorporated ("Syked"), Kevin Sykes-Bonnett ("Sykes-Bonnett"), and John Martinson's ("Martinson") (collectively "Defendants") motion for partial summary judgment. Dkt. 182. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On September 20, 2017, HP Tuners filed an amended complaint against Defendants asserting (1) violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; (2) violations of the Defend Trade Secrets Act, 18 U.S.C. § 1836; (3) violations

1 of the Washington uniform trade secret act, RCW Chapter 19.108; (4) violations of the
 2 Illinois trade secrets act, 765 ILCS 1065/1, *et seq.*; (5) unfair competition under the
 3 Washington consumer protection act, RCW Chapter 19.86; (6) unfair competition under
 4 the Illinois consumer fraud and deceptive business practices act, 815 ILCS 505/1, *et seq.*;
 5 (7) breach of contract; and (8) tortious interference with prospective contractual or
 6 economic relations. Dkt. 35.

7 On July 31, 2019, Defendants filed a motion for partial summary judgment on HP
 8 Tuners' claims involving trade secrets. Dkt. 182. On September 3, 2019, HP Tuners
 9 responded. Dkts. 188. On September 6, 2019, Defendants replied. Dkts. 197.

10 **II. FACTUAL BACKGROUND¹**

11 HP Tuners is a Nevada limited liability company that "provides complete, cost
 12 effective automotive tuning and data acquisition solutions for enthusiasts and
 13 professional shops." Dkt. 35, ¶¶ 5, 12. HP Tuners' "business includes but is not limited
 14 to computer hardware and software designed for use in custom and/or pre-programmed
 15 engine and transmission tuning and calibration applications for automobiles, trucks and
 16 other types of vehicles (including but not limited to ATVs, snowmobiles and
 17 watercraft)." Dkt. 189, ¶ 6. Keith Prociuk ("Prociuk"), HP Tuners' owner, asserts that
 18 HP Tuners' "confidential and proprietary software, source code, license key generator
 19 and offerings have been developed and extensively refined by [HP Tuners] at a
 20

21 ¹ HP Tuners argues that Defendants' motion "violates Rule 56 and LR 56.1 by virtue of their
 22 failure to include a statement of material facts which is mandated by the rule." Dkt. 188 at 1 n.1. Neither
 rule, however, requires such a statement of fact. Moreover, Defendants' motion is based on the argument
 that HP Tuners lacks evidence to support its claims against Defendants.

1 substantial cost and effort and constitute confidential information and valuable trade
2 secrets of [HP Tuners].” *Id.* ¶ 10.

3 Regarding HP Tuners’ claims for trade secret misappropriation, Prociuk declares
4 that HP Tuners “owned and possessed confidential and proprietary documents and data
5 containing trade secrets, including but not limited to source code, the [HP Tuners]
6 proprietary key generator and MPVI communication protocol documents.” *Id.* ¶ 14. He
7 also declares that a former owner of HP Tuners “provided Defendants with copies of and
8 access to” this information. *Id.* ¶ 16.

9 HP Tuners has submitted the expert report of Dr. Ernesto Staroswiecki
10 (“Staroswiecki”) in support of its claims. Staroswiecki qualifies his opinions by stating
11 that he evaluated “intellectual property (IP) claimed by [HP Tuners] as trade secrets or
12 otherwise protected property.” Dkt. 192-2 at 5. Staroswiecki opines that (1) “Syked had
13 access to IP that [HP Tuners] claims are trade secrets,” (2) “Syked disclosed to third
14 parties IP that [HP Tuners] claims are trade secrets,” (3) “Syked used in their products IP
15 that [HP Tuners] claims are trade secrets,” and (4) “Syked benefitted from access to [HP
16 Tuners’] trade secrets.” *Id.* at 6.

17 Sykes-Bonnett, owner of Syked, asserts that he formed Skyed in 2014 after
18 independently developing a software program to tune cars. Dkt. 182-1, ¶ 2. Sykes-
19 Bonnett declares that his program was developed long before HP Tuners claims he
20 received a copy of HP Tuners’ code. *Id.* ¶ 2. He declares that, although his code has
21 undergone revisions, the alterations were based on third-party software and not HP
22 Tuners’ code. *Id.* ¶¶ 4–5.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically

1 attested by that party contradict facts specifically attested by the moving party. The
2 nonmoving party may not merely state that it will discredit the moving party's evidence
3 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
4 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
5 nonspecific statements in affidavits are not sufficient, and missing facts will not be
6 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990).

7 It is the rare case when parties dispute the well-established standard for summary
8 judgment. Defendants assert that “[o]n an issue as to which the nonmoving party will
9 have the burden of proof . . . the movant can prevail merely by pointing out that there is
10 an absence of evidence to support the nonmoving party's case.” Dkt. 182 at 2 (citing
11 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007)). *Soremekun* is an
12 unusual opinion because the panel affirmed “the district court's well-reasoned Order
13 Granting Defendant Thrifty Payless, Inc.'s Motion for Summary Judgment” in a one-
14 sentence order and then attached that order as an appendix to the opinion. Regardless,
15 the underlying order cited *Celotex* for the proposition Defendants assert. *See Soremekun*,
16 509 F.3d at 984. In *Celotex*, the Supreme Court stated that it “find[s] no express or
17 implied requirement in Rule 56 that the moving party support its motion with affidavits
18 or other similar materials *negating* the opponent's claim.” *Celotex*, 477 U.S. at 323.
19 Moreover, “[o]ne of the principal purposes of the summary judgment rule is to *isolate*
20 *and dispose of factually unsupported claims or defenses*, and we think it should be
21 interpreted in a way that allows it to accomplish this purpose.” *Id.* at 323–24 (emphasis
22 added).

1 HP Tuners contends that Defendants’ recitation of the summary judgment standard
2 is partly in error. Dkt. 188 at 11–12. HP Tuners seems to confuse whether it must
3 produce sufficient evidence to prove its claims with whether Defendants must produce
4 any evidence at all. Regarding the first issue, the Court agrees with HP Tuners that the
5 issue at summary judgment is not whether the party has produced sufficient evidence to
6 prevail at trial. Instead, the Court considers whether the party has produced sufficient
7 evidence to create a material question of fact that must be resolved by a fact-finder.

8 However, on the second issue, Defendants’ initial burden is only to establish that
9 HP Tuners has failed to produce evidence on at least one essential element of its claim.
10 HP Tuners argues that “Defendants’ reference to [*Soremekun*] for the proposition that
11 summary judgment may be granted where ‘the nonmoving party lacks evidence to
12 support its case’ is completely distinguishable.” Dkt. 188 at 12. *Soremekun* is not
13 distinguishable on this point because, in *Celotex*, the Supreme Court held exactly what
14 Defendants assert, which is summary judgment is appropriate for a party that does not
15 bear the burden at trial if the party that does bear the burden lacks some evidence to
16 support every element of its claim. For example, the parties may agree that HP Tuners
17 has material that is considered a trade secret, but if HP Tuners has no evidence that
18 Defendants misappropriated that specific trade secret in any manner, then summary
19 judgment is appropriate because trial is unnecessary when evidence is lacking on an
20 essential element of HP Tuners’ claim. Having clarified these issues, the Court agrees
21 with HP Tuners on one additional issue.
22

1 Defendants move for summary judgment but fail to specify which of HP Tuners’
2 eight claims they seek to have the Court dismiss. For example, Defendants’ introduction
3 states that they “hereby move for partial summary judgment that the automobile tuning
4 software created, distributed, used or otherwise commercialized by Syked Tuning does
5 not contain any purported trade-secrets [sic] or other intellectual property claimed by [HP
6 Tuners] and that Syked Tuning’s continued commercialization of its tuning software
7 infringes no legitimate right of HP Tuners.” Dkt. 182 at 1. Defendants’ conclusion
8 “respectfully request that this Court enter partial summary judgment that the Syked
9 Tuning software at issue in this matter does not infringe any right of HP Tuners and that
10 all claims based on such allegations be dismissed from this action.” *Id.* at 8. Defendants
11 essentially request that HP Tuners or the Court set out the elements of HP Tuners’ claims
12 and determine which ones are based solely on the allegation that Syked’s software
13 includes HP Tuners’ trade secrets. HP Tuners responds that “it appears as if partial
14 summary judgment is only being sought in connection with Count II, Count III and Count
15 IV of the First Amended Complaint.” Dkt. 188 at 1 n.1. In reply, Defendants fail to
16 clarify which claims they attack. *See* Dkt. 197 at 1 (“The question presented is whether
17 HP Tuners can on the evidence adduced to date show that Syked ECU Tuning improperly
18 incorporates HP Tuners’ alleged trade-secrets in its client-based software.”). The
19 generality with which Defendants address HP Tuners’ claims is sufficient reason alone to
20 deny the motion. The Court, however, will attempt to address some disputed issues.

B. Incorporation of Trade Secrets

Defendants move for partial summary judgment on the issue of “whether Syked ECU Tuning improperly incorporates HP Tuners’ alleged trade-secrets in its client-based software.” Dkt. 197 at 1. On that specific question, the only relevant evidence is Staroswiecki’s report because the other alleged misappropriations are irrelevant to the question. For example, HP Tuners submitted evidence that Sykes-Bonnett improperly obtained HP Tuners’ key generator and improperly distributed keys to unlock HP Tuners’ product in exchange for various items. Dkt. 188 at 8 (“Sykes-Bonnett possessed HPT’s proprietary key generator tool for use with HPT’s interfaces and, in fact, generated HPT application keys for third parties for profit.”) (citing Sykes-Bonnett’s deposition and declarations in the record). Although this evidence appears to fully support a claim for misappropriation of a trade secret, it has nothing to do with the allegation that Syked’s software contains HP Tuners’ secrets. Similarly, HP Tuners claims that Sykes-Bonnett improperly obtained HP Tuners’ MPVI communication protocol documents. Dkt. 188 at 7 (HP Tuner’s former owner Ken Cannata “provided Kevin Sykes-Bonnett with [HP Tuners’] source code files, proprietary key generator and MPVI communication protocol documents.”). Neither HP Tuners nor Staroswiecki explain what MPVI stands for or how these documents or information within these documents was incorporated into Syked’s software. Thus, to the extent that HP Tuners’ claims are based on the misuse of its key generator or MPVI communication protocol documents, the Court concludes that the claims are outside the scope of this summary judgment motion.

1 Regarding HP Tuners' source code, there appears to be at least two aspects to HP
2 Tuners' claims. First, misappropriation includes acquisition by improper means as well
3 as use without consent. *See, e.g.*, RCW 19.108.010(2). Turning to HP Tuners'
4 complaint, the majority of the allegations are based on Defendants' improper acquisition
5 of HP Tuners' code and use of that code to improperly manipulate HP Tuners' software.
6 For example, in support of its Washington trade secret act claim, HP Tuners alleges as
7 follows:

8 Without authorization by HPT, upon information and belief, a third
9 party (who was a former employee of HPT) provided Defendants with
10 copies of and access to confidential and proprietary information of HPT,
11 including its confidential and proprietary source code.

12 The confidential and proprietary source code wrongfully obtained
13 and possessed by Defendants gives Defendants, and those active in concert
14 with them, the ability to modify HPT's confidential and proprietary source
15 code to allow users to bypass all licensing checks and prompts, thus
16 enabling HPT's users to use the software on any vehicle they wish without
17 paying any licensing fees to HPT.

18 ***

19 In violation of law, Defendants have misappropriated HPT's trade
20 secrets by modifying HPT's confidential and proprietary software to bypass
21 all licensing checks and prompts to obtain "free" tuning credits from HPT.

22 Defendants, acting in concert with others, have wrongfully accessed,
trespassed, engineered and/or hacked HPT's software, systems and source
code to remove licensing restrictions from HPT's VCM Suite Software to
distribute it for their own profit as well as to cause harm to HPT, which
Defendants view as a competitor.

 Moreover, Defendants, acting in concert with others, accomplished
this via various means including adding extra licenses to existing interfaces
and reselling them, by logging in via remote desktop to customer machines
to enter in a hacked license key and by selling a version of hacked software
with licensing defeated.

 Likewise, Defendants have misappropriated HPT's confidential and
proprietary information by attempting to sell a cloned HPT interface with
hacked credits on the internet.

1 Dkt. 35, ¶¶ 112, 113, 117–119, 121. Thus, the majority of HP Tuners’ claim is outside
2 the scope of Defendants’ motion.

3 Second, HP Tuners’ allegation based on copying is limited to an identifiable
4 section of its source code. Specifically, HP Tuners alleges that “Defendants have
5 misappropriated HPT’s parameter lists without HPT’s authorization and by having
6 incorporated them into Defendants’ own software.” *Id.* ¶ 120.² Staroswiecki identified
7 two direct references to HP Tuners’ physical adapter cable in Syked’s source code as
8 follows: (“HPT00021A”) and (“HPT00021B”). Dkt. 132-2, ¶ 31. Staroswiecki
9 discussed with HPT personnel and confirmed that these labels correspond to HPT cables.
10 Based on these facts, Staroswiecki opines that: “To interface or communicate with HPT
11 hardware would have required use of HPT’s communication protocols. Therefore, to
12 conduct these communications that Syked software was able to manage implies that
13 Syked was using HPTs communications protocols.” *Id.* ¶ 33. Thus, HP Tuners has
14 submitted evidence that Skyed copied or used HP Tuners’ product with what appears to
15 be parameters within the communication protocols.

16 Turning to the parties’ briefs, they dispute what HP Tuners can claim as a trade
17 secret and whether HP Tuners is able to prove that it possesses trade secrets. Although
18 the parties engage in these disputes, neither directly addresses whether the specific
19 information Staroswiecki identifies either is material that may be protected as a trade
20 secret as a matter of law, *see, e.g.*, 18 U.S.C. § 1839(3), or whether HP Tuners can

21
22 ² Based on the Court’s review of the complaint, this appears to be the only allegation related to
software copying in any of HP Tuners’ claims.

1 establish as a matter of fact whether it derives economic value from this information and
2 properly protected disclosure of this information, *Veritas Operating Corp. v. Microsoft*
3 *Corp.*, C06-0703JCC, 2008 WL 474248, at *3 (W.D. Wash. Feb. 4, 2008). The Court
4 declines to do so *sua sponte* and is satisfied that Defendants have failed to meet their
5 burden to establish that no questions of material fact exist as to Defendants' copying of
6 HP Tuners' trade secrets. Therefore, the Court denies Defendants' motion.

7 **C. Other Considerations**

8 The parties should be informed that there is another civil case set for trial on their
9 trial date of October 29, 2019. Although the Court usually allows the case that has been
10 pending the longest to proceed to trial first, which is this case, the Court is seriously
11 considering delaying this matter to let the other matter proceed to trial first. *See, Dietz v.*
12 *Bouldin*, 136 S. Ct. 1885, 1891 (2016) ("a district court possesses inherent powers that
13 are 'governed not by rule or statute but by the control necessarily vested in courts to
14 manage their own affairs so as to achieve the orderly and expeditious disposition of
15 cases.'") (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962)). Based on the
16 current state of affairs, it appears that this matter is nowhere near ready for trial while the
17 other matter presents specific and particularized issues with multiple disclosed experts
18 and would be a more efficient use of the Court's and the jury's time. Moreover, the
19 parties have informally contacted the Court regarding problems associated with preparing
20 a joint trial brief, which is unusual in that most parties can at least agree on what the
21 pending trial will entail. Therefore, unless the parties' pretrial materials, such as the trial
22

1 | briefs or pretrial order, convince the Court that this matter is truly ready for trial, the
2 | matter may be set over while the Court hears the other pending matter.

3 | **IV. ORDER**

4 | Therefore, it is hereby **ORDERED** that Defendants' motion for partial summary
5 | judgment, Dkt. 182, is **DENIED**.

6 | Dated this 4th day of October, 2019.

7 | 
8 | _____

9 | BENJAMIN H. SETTLE
10 | United States District Judge